83-333

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

C.P. CHEMICAL COMPANY, INC.,
Appellant,

v.

COMMISSIONER OF PUBLIC HEALTH,
Appellee.

On Appeal from the Massachusetts Supreme Judicial Court

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Does the Due Process Clause entitle a corporation to a hearing before a state administrative agency can determine that the corporation's sole product is prohibited, depriving the corporation of its fundamental right to pursue its livelihood?
2. Does the Equal Protection Clause permit a state to ban an interstate consumer product for health and safety reasons on any conceivable basis without regard to whether the state can show that its action has any rational scientific or medical basis?
3. Does the Commerce Clause permit a state to ban an interstate product, without regard to less restrictive alternatives, on the strength of speculative and unreliable scientific evidence that the product may have some adverse health effects?

LIST OF PARTIES *

C.P. Chemical Company, Inc., Appellant.**

Alfred Frechette, Massachusetts Commissioner of Public Health, Appellee.

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* The parties to the proceeding below were C.P. Chemical Co., Inc., the Commissioner of Public Health, Borden, Inc., the Formaldehyde Institute, Anderson Foam Distributors, and Berkshire Gas Co.

** C.P. Chemical Company, Inc. does not have any subsidiary or parent companies.

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OPINION BELOW

The opinion of the Supreme Judicial Court of Massachusetts is reported at *Borden, Inc. v. Commissioner of Public Health*, 388 Mass. 707, —— N.E.2d —— (1983), Appendix ("App.") A at 1a.

JURISDICTION

The judgment of the Supreme Judicial Court of Massachusetts, reversing a judgment entered by the Superior Court for the County of Suffolk, Massachusetts, and affirming regulations promulgated by the appellee Commissioner of Public Health on the grounds, *inter alia*, that the regulations do not violate or otherwise abridge rights guaranteed by the Constitution of the United

States was entered on April 12, 1983. *See* App. A at 1a. C.P. Chemical Co., Inc. petitioned for rehearing on April 29, 1983. That petition was denied on June 1, 1983.

The notice of appeal to this Court was duly filed in the Supreme Judicial Court of Massachusetts on July 29, 1983. This appeal is being docketed within 90 days of the judgment of the Supreme Judicial Court of Massachusetts denying rehearing.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2) (1976).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Article I, § 8 of the United States Constitution provides in pertinent part:

> The Congress shall have Power . . . To Regulate Commerce with Foreign Nations and among the several States and with the Indian Tribes.

STATEMENT OF THE CASE

On April 12, 1983, the Supreme Judicial Court of Massachusetts rendered its opinion in *Borden, Inc. v. Commissioner of Public Health*, 388 Mass. 707, —— N.E.2d —— (1983) (App. A) reversing a decision by the Superior Court for the County of Suffolk, Massachusetts (App. D) and reinstating regulations ("the Regulations") promulgated by the Massachusetts Commissioner of Public Health ("the Commissioner") banning urea-formaldehyde foam insulation ("UFFI") from com-

merce in Massachusetts (App. E). The Supreme Judicial Court's opinion was based upon federal constitutional grounds as well as upon the Massachusetts Hazardous Substances Labeling Law and various provisions of the Massachusetts code relating to administrative practice and procedure.

With respect to the federal constitutional issues, the Supreme Judicial Court held that foam insulation manufacturers are not constitutionally entitled to an adjudicatory hearing prior to the outright prohibition of their product, their industry and their livelihood; that the prohibition against UFFI need not be supported by any evidence in the administrative record but only by any conceivable basis, which basis need not exist at the time of the Commissioner's action; that C.P. Chemical Company, Inc. ("C.P.") had no right to a hearing on the Commissioner's determination that C.P.'s product, Tripolymer 102, is a UFFI within the meaning of the Regulations and thus prohibited; and that the Commissioner's actions and the Regulations are not constitutionally infirm in any other respect. C.P. immediately petitioned for a rehearing on several constitutional grounds, including a claim that the Regulations impermissibly burden interstate commerce (App. F). That petition was summarily denied (App. G).

The rulemaking that spawned this litigation had its beginnings in the spring of 1978 when several Massachusetts residents who recently had UFFI installed in their homes registered complaints with the Massachusetts Office of Consumer Affairs that formaldehyde vapors were being emitted by the UFFI. UFFI is a modern insulation product made from polymerized urea-formaldehyde resins and a foaming agent. These ingredients are mixed with air in a foaming gun to form a foamy resin. The foam is expelled from the gun into small holes cut in existing external walls of the building to be insulated. It completely fills the space between the walls and hardens into self-supporting insulation. The UFFI resins are excellent

bonding agents that are commonly used in plywood, particle board and plaster. Textiles, rugs, clothing and deodorants, as well as many other household products also contain formaldehyde or formaldehyde resins. These products emit significant amounts of formaldehyde. In short, formaldehyde vapors are a common part of any human environment.

The ubiquitous presence of formaldehyde makes it difficult to isolate emissions from any single product. Unless UFFI is therefore secluded from other sources of formaldehyde, a measurement of ambient formaldehyde levels in any home will not provide any meaningful indication of the contribution, if any, that UFFI makes to ambient formaldehyde levels.

Tripolymer is the product of the C.P. Chemical Company, Inc. Tripolymer is banned pursuant to the Commissioner's interpretation of the Regulations. Tripolymer is chemically distinct from UFFI for two principal reasons. First, UFFI has free formaldehyde in its chemical composition; Tripolymer does not have free formaldehyde in its chemical composition. Second, UFFI is made from urea-formaldehyde; Tripolymer is made from phenol, polymethylol ureas and methylol ureas and not from urea or formaldehyde. Because it is made with phenol, Tripolymer is composed of stable methylene and polymethylene urea groups that will not revert to form formaldehyde except under extreme circumstances, like boiling in acid. In contrast, the methylol and ether groups in UFFI are reactive and UFFI has very few stable methylene groups. The reactive groups can revert to form formaldehyde through hydrolysis. The formaldehyde may be emitted into living space.

Tripolymer was specially designed by C.P. because these chemical differences virtually eliminate the possibility of formaldehyde emissions from Tripolymer. In the short run, Tripolymer will not emit formaldehyde because there is no free formaldehyde in its chemical

composition. Over a longer term, Tripolymer will not emit formaldehyde because the stable methylene bonds will not revert through hydrolysis.

In response to the citizen complaints about UFFI, the Commissioner conducted air sample tests in seventy-three UFFI insulated homes to determine whether formaldehyde vapors were present. The Commissioner concluded on August 10, 1978, that a formaldehyde level of less than 0.1 parts per million ("ppm") would not cause any adverse health symptoms, while a level between 0.1 ppm and 0.5 ppm could, but in most cases would not, result in health problems. The Commissioner also concluded that there was no evidence of long term effects from exposure to UFFI. The Commissioner announced that more extensive testing would be done to confirm that "formaldehyde vapor problems are encountered in only a small proportion of installations, and that these problems are associated with improper installation technique." Memorandum to Local Board of Health from David Kinloch, M.D., Deputy Commissioner, Mass. State Dept. of Public Health (App. H). The Massachusetts Executive Office of Consumer Affairs agreed with this determination and proposed to eliminate vapor problems by licensing UFFI installers and setting standards for the materials used.

These testing or licensing programs were never undertaken. Instead, on November 17, 1978, the Commissioner and the Executive Office of Consumer Affairs reversed their direction without any cause and requested that C.P. and the UFFI manufacturers suspend sales until the industry proved that the vapors were a result of faulty installation. This action was in marked contrast to the very recent determination that the "problem" consisted of a few faulty installations. C.P. responded promptly to this request on November 28, by promising to supply the Commissioner with any information needed to identify the source and cause of the vapors. In its response, C.P. noted that Tripolymer is chemically different from UFFI

and that it should be treated differently.[1] Letter to David Kinloch and Lawrence Buxbaum (App. I). The Commissioner did not respond to C.P.'s offer nor did he acknowledge that Tripolymer is chemically distinct.

The Commissioner did take air samples from one hundred and ninety-eight homes of people who had responded to the Commissioner's request for complaints about UFFI. None of the homes had formaldehyde levels above 0.5 ppm and seventy-eight percent were below 0.1 ppm, the level deemed safe by the Commissioner. The two homes insulated with Tripolymer that were tested had no detectable levels of formaldehyde.

Nonetheless, on March 7, 1979, the Commissioner gave notice that hearings would be held a scant three weeks later on March 29-30, 1979, to receive comments on the health effects of UFFI. Immediately upon learning of the March 29-30 hearings, C.P. and the UFFI manufacturers filed formal requests with the Commissioner for an adjudicatory hearing and certain procedural rights, including the right to cross-examine the Commissioner's witnesses, to discovery of complaints about UFFI that had been made to the Commissioner and to inspect documents in the Commisisoner's possession. These requests were all denied.

The hearings were convened as scheduled even though there had been insufficient time to study or develop valid empirical evidence on the complex medical and scientific issues involved. A Massachusetts Department of Public Health lawyer acted as presiding officer. No one testified under oath. The submissions by the proponents of the Regulations consisted of admittedly inconclusive and flawed empirical studies on the propensity of UFFI to emit formaldehyde vapors into indoor ambient air and

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[1] Of all the Massachusetts consumers who complained about formaldehyde vapors resulting from UFFI, only one of the complaints related to Tripolymer and that complaint was satisfactorily resolved.

of unsworn (and unsubstantiated) complaints of nineteen Massachusetts residents who allegedly experienced discomfort after UFFI was installed in their homes. None of these nineteen consumers had Tripolymer in their homes.

Notwithstanding the absence of reliable scientific information about UFFI, the Commissioner issued his findings on November 1, 1979, and promulgated the Regulations, prohibiting UFFI from commerce in Massachusetts. The Regulations classified UFFI and pure formaldehyde as toxic substances and irritants that could cause substantial injury. Only UFFI was banned, however; formaldehyde continued to be permissible in commerce. The Commissioner placed great emphasis upon the nineteen consumer complaints and concluded that "[i]n all likelihood, substantial numbers of other people are similarly affected." Summary of the Evidence and Findings and Conclusions Concerning Formaldehyde and UFFI ("Summary") at 82 (App. E).

The Commissioner could not determine the chronic effects of various levels of formaldehyde or whether there is a formaldehyde level below which there are no adverse health effects. Since he did not have this data, he adopted a zero exposure level. That action was unsupported for several reasons. First, it is a scientific absurdity to prove that all exposure levels are safe. Second, the Commissioner never attempted to identify the cause of the consumers' irritations or the existence of other persons who might have been similarly affected. Third, the evidence pertaining to emissions levels from UFFI consisted of laboratory tests and home air sample tests, including the Commissioner's study of 198 homes. The Commissioner concluded that the laboratory tests concerning formaldehyde were either methodologically unreliable or the results could not be extrapolated to a home environment since the tests did not take into account the numerous factors which determine actual home emissions. The

home air samples were inconclusive because they did not distinguish between formaldehyde emitted by UFFI and by other household products known to emit formaldehyde. Also, none of the tests compared UFFI homes with non-UFFI homes so there could be no estimate of UFFI's overall contribution, if any, to ambient formaldehyde levels. Finally, the tests were conducted only in homes where complaints had been lodged, so there was no random sampling of UFFI homes and there was no attempt to control or account for temperature, humidity or other environmental factors which have a strong effect on emissions. And of course, Tripolymer, a chemically distinct foam insulation was not used in any of the tests, so the tests, however flawed, were not relevant to any determination of Tripolymer's emissions.

The defects in the Commissioner's action are also evident from his own findings: for example, he acknowledged that he lacked any epidemiological and clinical studies on the long term effects of formaldehyde vapors; that he could not determine whether various levels of exposure were safe; that he did not know the levels of formaldehyde emitted by UFFI into living space; and that he had no knowledge of background levels of formaldehyde.

Experts at the hearing generally agreed that the extent of injury from formaldehyde vapor is directly related to dose and exposure duration and that there should be no adverse health effects below 0.1 ppm, but they disagreed as to an exact exposure safety level. Several animal studies designed to determine dose-response relationships found no ill effects from short term exposure to relatively low doses of formaldehyde. The one study of exposure of animals to UFFI found UFFI to be nontoxic and not an irritant. The Commissioner made no attempt to determine such a dose-response relationship and moreover, it is evident from the record that he could not make such a correlation.

The Commissioner's action was also unsupported because he refused to consider several regulatory alternatives presented by the industry which were designed to mitigate and eliminate vapors. As the Commissioner noted prior to the hearings, most of the alleged vapor problems stemmed from faulty installation. The industry proposed to remedy this situation by insuring that all installers are tested and licensed by the state and follow strict installation standards. Industry also proposed labelling standards to warn consumers of any possible harmful effects. The Commissioner rejected these proposals on the grounds that he did not know whether they would be effective. He placed the burden on industry to prove that such measures would work and then rejected the measures when industry could not absolutely prove their effectiveness.

Finally, the industry offered to remedy all existing and future vapor problems. These proposed remedies included installation of vents in each house, chemical sponges to soak up the formaldehyde, air filters, and ammonia coatings. Although a number of these remedies had been shown to be effective in field studies, the Commissioner cited his lack of knowledge of such remedies and industry's failure to prove their effectiveness as the reason for rejecting them.

In sum, the record plainly shows that instead of proceeding rationally, and considering the evidence before him, the Commissioner bowed to the hysteria of a few citizens and summarily banned a substantial interstate industry.

On November 16, 1979, C.P. and several UFFI manufacturers filed separate suits against the Commissioner in the Superior Court for Suffolk County for declaratory judgments that the Regulations were unconstitutional under both the United States and Massachusetts Constitutions, on the grounds, *inter alia*, that the Regulations

and the Commissioner's actions violated the Due Process Clause, the Equal Protection Clause, and the Commerce Clause. These cases were consolidated and tried in Superior Court before a specially appointed judge, Justice John T. Ronan.

On January 18, 1982, after a plenary civil trial, the Superior Court rendered an opinion invalidating the Regulations on several grounds. The Superior Court held, among other things, that the Regulations lacked a rational basis, that the Commissioner's failure to consider alternatives was arbitrary and irrational and that there was no due process for the affected industry. The Court cited numerous examples of this irrationality; for example, the Court found "no evidence" to support the conclusion that a zero exposure level was necessary. It is manifest from the opinion that the Superior Court reviewed the lay and technical evidence painstakingly and afforded the Commissioner all reasonable presumptions. Nonetheless, after a lengthy review and a careful, thorough analysis in its opinion, the Superior Court found no basis whatsoever for the Regulations.

The Commissioner appealed the Superior Court ruling and, by agreement of the parties, the appeal was expedited directly to the Massachusetts Supreme Judicial Court. On April 12, 1983, the Supreme Judicial Court reversed the Superior Court and reinstated the Regulations.

In its decision, the Supreme Judicial Court made two holdings that are specifically challenged here. First, the Supreme Judicial Court denied C.P.'s claim that the Due Process Clause entitles it to a hearing on the Commission's determination that Tripolymer is a UFFI and is prohibited by the Regulations. In reaching this decision, the Supreme Judicial Court held that an adjudicatory proceeding is constitutionally required only if the Commissioner's action determines the rights, duties or privileges of specifically named persons. App. A at 10a. The

Court decided that the Commissioner's ruling that Tripolymer was included in the UFFI ban did not determine specific individual rights.

Second, the Supreme Judicial Court held that the plaintiffs "must prove 'the absence of any conceivable ground upon which [the Regulations] may be upheld.'" *Id.* at 17a (quoting *Purity Supreme, Inc. v. Attorney General*, 380 Mass. 762, 776 (1980) (quoting *Druzik v. Board of Health*, 324 Mass. 129, 138 (1949)).[2] This conceivable basis standard is distinct from a rational basis standard; the former recognizes that a regulation must be upheld in deference to an agency so long as it is conceivably, but not necessarily rationally, related to its stated purpose. When the Supreme Judicial Court has applied the higher rational basis standard, however, it has reviewed the evidence offered by all parties and then decided whether the agency action had a rational basis. *E.g.*, *Attorney General v. Sheriff of Worcester*, 382 Mass. 57, 413 N.E.2d 722 (1980); *Consolidated Cigar Corp. v. Department of Public Health*, 372 Mass. 844, 364 N.E.2d 1202 (1977). In reviewing the evidence, the Supreme Judicial Court discounted the fact that there was no reliable evidence in the record as to (1) emissions of formaldehyde by UFFI or Tripolymer, (2) harmful levels of formaldehyde, (3) dose-response relationships, or (4) the difference, if any, between ambient formaldehyde levels in UFFI and non-UFFI homes. The Supreme Judicial Court held that even in the absence of any such reliable evidence about the extent to which UFFI emits a harmful substance, the threshold below which that substance is harmful and the number of people, if any, who have

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[2] Although the Court refers to the necessity of showing a rational basis, as opposed to a conceivable basis, at some points in its opinion, it is evident from the discussion in the opinion and the Court's disposition of the case that the "any conceivable basis" standard was applied.

been adversely affected by UFFI, the Commissioner had at least a conceivable, if not a rational, basis to ban UFFI without further study or consideration of less restrictive alternatives. The Supreme Judicial Court also held that even though the Commissioner did not rely upon any evidence relating to the potential carcinogenicity of UFFI during the rulemaking, the Commissioner could adduce that evidence at trial as further support for the Regulations.[3]

The law of Massachusetts, as a result of this opinion, now seems to be that administrative action is lawful if it has any conceivable basis in fact, even if it cannot be said to be rationally based. This decision makes *de novo* review by a court meaningless because the Court cannot consider the veracity of witnesses, weigh the evidence or perform any of its judicial functions. If the agency presents one fact in support of its action, regardless of that fact's reliability or when it was learned, then it has shown a conceivable basis and the person seeking judicial review will be denied any meaningful opportunity to be heard.

THE QUESTIONS ARE SUBSTANTIAL

1. THIS CASE PRESENTS THE SUBSTANTIAL QUESTION OF WHETHER A CORPORATION CAN BE DENIED ITS LIVELIHOOD BY A STATE ADMINISTRATIVE AGENCY WITHOUT A HEARING

In this section of the Statement, C.P. challenges the constitutional sufficiency of the procedures employed by the Commissioner to include Tripolymer within the UFFI ban. C.P. contends that the Commissioner's actions and the Supreme Judicial Court's decision have denied it any meaningful opportunity to contest application of the Regulations to Tripolymer and have prevented C.P. from pursuing its business. The ban of Tripolymer has had

[3] The Commissioner did not rely on the carcinogenicity studies because they are inconclusive.

dire economic impact upon C.P., beyond cessation of C.P.'s business activities in Massachusetts. The case presents the substantial question of whether a corporation is entitled to a due process hearing before its livelihood is outlawed. This Court has not clearly and unequivocally confirmed that such a right exists and this case presents the Court with a timely and critical opportunity to determine when and how a corporation may be denied its continued existence.

This Court recently recognized in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) that,

> [M]any controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and an opportunity for hearing appropriate to the nature of the case.

Id. at 428 (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)). The Court has further stated that the "Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged. Thus, it has become a truism that '*some* form of hearing' is required before the owner is finally deprived of a protected property interest." *Id.* at 433 (quoting *Board of Regents v. Roth*, 408 U.S. 564, 570-71 n. 8 (1972)). C.P. is an aggrieved party here and urges that it must, as a matter of federal constitutional law, be entitled to a hearing with the rights of cross-examination, confrontation of adverse evidence, notice, and an opportunity to present evidence prior to the outlawing of its business. The Supreme Judicial Court's decision denying that opportunity and adopting an "any conceivable basis" standard for judicial review of agency action denies C.P.'s constitutional liberty right and deprives C.P. of any meaningful opportunity to contest that denial.

Corporations as well as individuals have constitutionally protected liberty interests. This Court has stated that a corporation is a "person" within the meaning of the Equal Protection and Due Process Clauses. *First National Bank v. Bellotti*, 435 U.S. 765, 780 n. 15 (1978); *Grosjean v. American Press Co.*, 297 U.S. 233, 244 (1936). Consequently, a corporation should have the same rights as an individual to operate a business and pursue the occupation of its choosing free from arbitrary and unreasonable governmental interference. *See Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 895 (1961); *Greene v. McElroy*, 360 U.S. 474, 492 (1959); *Schware v. Board of Bar Examiners*, 353 U.S. 232, 238 (1957). This right is and must remain inherent and fundamental for both individuals and corporations in America's free enterprise system. To deny such a right summarily, as Massachusetts has done, threatens all commercial enterprise and this Court must reaffirm the existence of that right for just that reason.

There can be no question that C.P.'s liberty right has been denied. The Regulations classify UFFI as a banned hazardous substance that must be removed from commerce in Massachusetts. Mass. Admin. Code tit. 105 § 650.020 (1979). The Commissioner has determined that C.P.'s product, Tripolymer, is a UFFI within the meaning of the Regulations and is therefore prohibited. Trial Exhibit 52 (App. J). Sale and installation of Tripolymer in Massachusetts is now illegal and because Tripolymer is C.P.'s only product, C.P. is unable to conduct business in Massachusetts.

Since its liberty right was denied, C.P. was unquestionably entitled to a due process hearing. The Commissioner deprived C.P. of a meaningful opportunity to challenge inclusion of Tripolymer within the ban of UFFI,

however.[4] C.P. has a constitutional right to such a hearing because the Commissioner has made a quasi-judicial determination that Tripolymer is included within the ban of UFFI and C.P. must therefore cease doing business in Massachusetts. The action of an administrative agency is adjudicatory and must be accompanied by a hearing when it determines the rights and liabilities of specific individuals. *United States v. Florida East Coast Railway*, 410 U.S. 245 (1973) (quoting *Bi-Metallic Investment Co. v. State Board of Equilization*, 239 U.S. 441 (1915)). The Commissioner's ruling on Tripolymer was just such a determination; it affected specific individuals, namely C.P., and was directed at a specifically identified product: Tripolymer.

In *Willner v. Committee on Character & Fitness*, 373 U.S. 96 (1963) an individual was denied admission to a state bar association without a hearing on the charges filed against him. The Court held that summary exclusion of a person from the practice of law or from any other occupation contravenes the Due Process Clause. *Id.* at 102. Since the petitioner in *Willner* was to be deprived of his livelihood, he was entitled to a hearing

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[4] Immediately after the Commissioner scheduled hearings on the proposed UFFI regulations, C.P. and the UFFI manufacturers filed written requests for adjudicatory hearings on the proposed regulations and on the issue of whether any particular product was included in the proposed ban. They also requested the right to confront and cross-examine witnesses, to file supplementary material for inclusion in the public record for 30 days following the close of oral testimony, to inspect and copy documents and to interview certain Department of Public Health personnel. These requests were subsequently denied at the hearing. The opponents of the regulations were precluded from obtaining advance notice of the identity of those persons testifying in favor of the regulations. The opponents of the regulations were even denied the opportunity to submit written questions which the Commissioner would propound to the witnesses. The requests for an adjudicatory hearing and for certain procedural rights were renewed in connection with the repurchase hearings. These requests were also denied.

with the rights of confrontation and cross-examination. *Id.* at 103-04. C.P. is entitled to no less in the case at bar.

It is true that C.P. had an opportunity at the Superior Court trial to confront and cross-examine adverse witnesses and to present evidence; that opportunity was rendered meaningless by the Supreme Judicial Court's decision, however, and ultimately afforded C.P. no process at all. In Massachusetts, a trial in superior court is a permissible means of seeking an adjudicatory and *de novo* review of agency action. In this case, that was the only means of review available to C.P. and at first glance, that opportunity would seem to provide due process because the Superior Court reviewed all the evidence in an adversary proceeding and rendered its opinion. Had the proceedings terminated with the Superior Court's order, C.P. would have received all the process to which it was entitled.

The proceedings continued, however, when the Supreme Judicial Court reviewed the Superior Court's decision on direct appeal. That review resulted in a rule of decision that required the Superior Court to uphold the Commissioner's action upon finding either (1) that the Commissioner had presented one fact in a legislative hearing in support of the Regulations, or (2) that the Commissioner presented such a fact at trial, regardless of whether the fact had been relied upon in promulgating the Regulations or was impeached by other evidence. That one fact represents a minimal "conceivable" basis for the Commissioner's action and once it is established at an administrative hearing, Massachusetts law now requires a reviewing court to uphold the Regulations without regard to any other evidence.

Using this rule, the Supreme Judicial Court nullified C.P.'s rights to cross-examination, confrontation, notice, discovery and inspection. The Court's decision in reality struck C.P.'s evidence from the record and required the

Superior Court to ignore all the cross-examination, the impeachment of the Commissioner's evidence, the veracity of the Commissioner's witnesses, to refrain from considering the record as a whole and, upon the filing of a single affidavit by the Commissioner, to enter judgment for the Commissioner.

C.P. submits that the dictates of procedural due process cannot be circumvented by a rule of decision that renders adjudicatory proceedings meaningless. The decisions in *Grosjean* and *Willner* together mean that C.P.'s liberty to pursue its business cannot be abridged without a meaningful hearing. Massachusetts has sought to do so by requiring the trial court to ignore C.P.'s evidence if the Commissioner presents any evidence, regardless of its reliability, in support of the Regulations. That rule strips C.P. of any meaningful opportunity to have the merits of its claim judged fairly and denies C.P. its fundamental liberty to pursue the business of its choosing and to an adjudicatory hearing prior to the deprivation of that liberty. C.P. asks this Court for a definitive ruling that corporations are entitled to such fundamental rights before they can be banished from existence and that Massachusetts has deprived C.P. of those liberties.

2. **THIS CASE PRESENTS THE SUBSTANTIAL QUESTION OF WHETHER THE EQUAL PROTECTION CLAUSE PERMITS A STATE TO BAN AN INTERSTATE CONSUMER PRODUCT FOR HEALTH AND SAFETY REASONS ON ANY CONCEIVABLE BASIS WITHOUT REGARD TO WHETHER THE STATE CAN SHOW THAT ITS ACTION HAS ANY RATIONAL SCIENTIFIC OR MEDICAL BASIS**

In this section of the Statement, C.P. contends that the Supreme Judicial Court announced a constitutionally impermissible standard for review of the Regulations and that the application of that standard to C.P. has denied

it equal protection of law. The premise of C.P.'s contentions is that minimal scrutiny under the Equal Protection Clause of the Fourteenth Amendment insists that state action have a rational basis: "A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). This formulation has been relied upon and quoted with approval in many subsequent decisions. *E.g., United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 174 (1980); *Johnson v. Robison*, 415 U.S. 361, 374-75 (1974) (quoting *Reed v. Reed*, 404 U.S. 71, 75-76 (1970)). In this context, it means that some rational basis must exist to justify disparate treatment of corporations otherwise similarly situated. While that standard gives Massachusetts considerable latitude in treating persons and products differently, it does not invest it with arbitrary and unbridled discretion. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 439 (1982) (Blackmun, J., separate opinion).

C.P. submits that the record before this Court reveals no rational basis for the Regulations and that the Supreme Judicial Court's decision upholding the Regulations is unconstitutional because it does not require that the Regulations have a rational basis, but only that they have a "conceivable" basis. This case therefore presents the substantial federal question of whether a state may ban an interstate consumer product for health reasons without any reliable or rational scientific evidence of adverse health effects so long as the state may conceive of a relationship between the product and alleged adverse health effects.

The Commissioner decided that a ban of UFFI would promote Massachusetts residents' health and safety. This decision rested upon the unsworn testimony of a few lay

persons who allegedly suffered adverse health effects after installation of UFFI (but not Tripolymer) in their homes. The inference that UFFI caused these health effects was and remains completely unsubstantiated and is a wholly insufficient and irrational grounds for the economic destruction that the Commissioner has already caused.

Nonetheless, the Supreme Judicial Court upheld the Commissioner's action and placed an insurmountable burden upon the industry to justify its continued existence. In Massachusetts, "a plaintiff [now] must prove the absence of any conceivable ground upon which [the rule] may be upheld," before an agency rule can be successfully challenged. App. A at 17a (quoting *Purity Supreme, Inc. v. Attorney General*, 380 Mass. 762, 776 (1980)). Moreover, the agency does not have to make findings of fact in the administrative record, *id.* at n. 8, and need not offer any justification for its action unless and until a private litigant decides to incur the expense of challenging the agency action.

In applying this standard of review to the Regulations, the Supreme Judicial Court dismissed the dearth of evidence on UFFI emissions and potential health effects as unimportant and held that the Regulations were valid even if they had a conceivable, but not a rational basis.

> In light of this evidence, we cannot say that the commissioner acted arbitrarily or capriciously in banning UFFI. That the commissioner was unable to determine the amount of formaldehyde that UFFI contributed to the indoor environment, that he did not know how many people in the Commonwealth had been affected by UFFI, that he had not compared the levels of formaldehyde in UFFI and non-UFFI houses, that he had not caused epidemiological studies to be made to determine the incidence of symptoms allegedly caused by UFFI, that experts

> called by the plaintiff at trial offered evidence contrary to the commissioner's, and that the commissioner's experts significantly qualified their testimony on cross-examination does not obviate the fact that he had a rational and certainly a conceivable basis for his action.

Id. at 23a-24a (footnote omitted). The Court did use the word "rational" in its opinion, but given the lack of meaningful evidence in the record, the Court did not intend the word's ordinary meaning because it is logically, scientifically and intuitively impossible to reach any rational conclusion about UFFI's emissions and consequent health effects without any of this information. There is no doubt, then, that a conceivable, but not necessarily rational, basis is all the Supreme Judicial Court required.

C.P. would agree that if the record contained reliable empirical evidence, however hotly contested, that UFFI emitted harmful amounts of formaldehyde, then the Commissioner could rationally conclude that a ban of UFFI would promote health and safety. The record does not contain any such evidence, however, and in its absence the Regulations make an unfair distinction between UFFI and other household products, including pure formaldehyde, which are not banned. Yet the Supreme Judicial Court condones this arbitrary decision making by upholding the Regulations merely on a conceivable basis. The *reductio ad absurdum* of this viewpoint is that any product can be banned solely on the basis of a few consumer complaints and without regard to the reliability of those complaints, so long as a relationship is conceivable between the complaint and the product. Such an administrative procedure is totally irrational because it does not require the agency to consider or develop empirical data that is essential to any determination about the health effects of UFFI. In short, the Commissioner is not required to evaluate whether UFFI has any health effects before he can ban it on the grounds that the ban promotes health.

This Court has never fully defined the requirements and lower boundaries of minimal rational scrutiny in Equal Protection cases. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982); *Schweiker v. Wilson*, 450 U.S. 221 (1981) (Powell J., dissenting). The Court's decisions do recognize that a legislative classification must have a rational basis that permits the conclusion that a legislative or administrative classification will further the legislative purpose. *See* 450 U.S. at 230. State action which lacks such rational underpinnings cannot be upheld. In this case, the Supreme Judicial Court, by holding that the Commissioner's action need only have a conceivable basis and by excusing the total absence of valid empirical data, has impermissibly lowered the applicable constitutional standard. This case, therefore, gives the Court an important opportunity to clarify the distinction between rational and conceivable bases particularly in the context of complex scientific rulemakings and to define the regulated community's irreducible rights.

In *United States Railroad Retirement Board v. Fritz*, Justice Stevens, in dissent, stated that "if an any conceivable basis standard is constitutional then judicial review will constitute a mere tautological recognition of the fact that Congress did what it intended to do." 449 U.S. at 180. Such a standard "virtually immunizes social and economic legislative classifications from judicial review," since it is impossible to refute every conceivable basis which could be proffered by an agency in defense of its regulations. That is precisely the case here; both the Commissioner and the S.J.C. have insisted that the industry must prove that UFFI, at any concentration in any situation, does not have any health effect on humans. That is an impossible and unreasonable burden to put upon any industry, especially in complex regulatory matters such as those involving chemical products where scientific opinion is often undeveloped or conflicting. Its effect will be to insulate the Commissioner's action from judicial scrutiny and the Equal Protection Clause will

become a dead letter in any review of state administrative action.

C.P. asks this Court to recognize that in complex scientific rulemakings involving the banning, and not the mere regulation, of an industry, the Equal Protection Clause requires an agency to have some reliable scientific evidence, as a constitutional minimum, before it can separate one consumer product from others with similar properties, ban it and thus bankrupt an entire industry. That does not mean that the agency must be able to identify the harm that a particular product might pose with exact certainty, but the agency must have as a point of reference at least some reliable evidence that establishes the connection between the product to be banned and its confirmed harmful impact or potential harmful impact.

3. THIS CASE PRESENTS THE SUBSTANTIAL QUESTION OF WHETHER THE COMMERCE CLAUSE PERMITS A STATE TO BAN AN INTERSTATE PRODUCT ON THE STRENGTH OF SPECULATIVE AND UNRELIABLE SCIENTIFIC EVIDENCE THAT THE PRODUCT MAY CAUSE ADVERSE HEALTH EFFECTS

In this section of the Statement, the petitioners challenge the Regulations on the grounds that they impose a burden on interstate commerce which is manifestly excessive in relation to the Regulations' putative benefits to Massachusetts. The case presents the substantial federal question of whether a state can absolutely ban, not regulate, a large interstate industry on the basis of speculative and unreliable scientific evidence, particularly in an area of trade in which Congress has expressed an interest in national uniformity, when no ascertainable local benefit will result. C.P. respectfully submits that in complex scientific rulemakings such as this one, states must establish a record and rely upon some reliable empirical evidence before banning an entire interstate industry.

The general standard in Commerce Clause cases where Congress has not fully exercised its constitutional power to regulate interstate commerce and a state has taken action to burden commerce is:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will, of course, depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (citation omitted); *see Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981); *Raymond Motor Transportation, Inc., v. Rice*, 434 U.S. 429 (1978). This standard requires that the Regulations meet four tests to be upheld: (1) they must effectuate a legitimate local public interest; (2) they must regulate "evenhandedly"; (3) their effect on interstate commerce must be incidental; and (4) the incidental burden they place on interstate commerce must not be clearly excessive in relation to the local benefits. 397 U.S. at 142.

The Regulations do not meet any of the four requirements but most importantly, there is no evidence either that the Regulations "effectuate a legitimate local public interest" or that the burden they impose on interstate commerce is incidental in relation to the local benefits they purportedly achieve. Furthermore, by using an any conceivable basis standard, the Supreme Judicial Court has permitted profound effects on interstate commerce without any inquiry into the effects of the Commissioner's action or the possibility that less burdensome alternatives are available.

C.P. does not question that the purpose of the Massachusetts Hazardous Substances Labeling Act, Mass. Ann. Laws ch. 94B § 1-10 (Michie/Law. Coop. 1975) to promote the health and safety of Massachusetts residents, is a legitimate local public interest that can be reached through Massachusetts' police powers. C.P. urges, however, that the Regulations do not *effectuate* that interest; they represent an arbitrary and unsupported attempt to destroy a foreign industry without providing any constitutionally sufficient evidence that a demonstrable local benefit will result. The ban of UFFI is analogous to the truck-length regulations which this Court invalidated in *Raymond Motor Transportation* and in *Kassel*. In both of those cases, the state concededly had a legitimate safety interest in highway state regulation but this Court invalidated the regulations because they marginally contributed to highway safety and substantially burdened interstate commerce.

The same situation exists here. The Massachusetts trial court found that the evidence presented to it, as well as the administrative record, did not provide a reliable or rational basis for the Commissioner's conclusion that a ban of UFFI would reduce ambient indoor formaldehyde levels or that the ambient levels which the Commissioner claims are emitted by UFFI cause or create an appreciable risk of human injury or illness.[5]

The trial court found that without this information an agency would not be warranted in concluding, as the Commissioner did, that the population threshold for irritant or toxic effects of exposure to formaldehyde vapor is

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[5] The Fifth Circuit recently invalidated a federal ban of UFFI promulgated by the Consumer Product Safety Commission. Gulf South Insulation v. Consumer Prod. Safety Comm., 701 F.2d 1137 (5th Cir. 1983). Although the CPSC relied on more conclusive evidence than the Massachusetts Department of Public Health, the Fifth Circuit found that the record developed before the CPSC did not support the ban.

zero. C.P. submits that this information is the *sine qua non* of scientific and toxicological rulemaking and without it, any toxicological rulemaking must be without meaningful support.[6]

The absence of any valid empirical data that the Regulations will produce a local benefit is highlighted by the fact that although pure formaldehyde is identified in the Regulations as a hazardous substance, it is not banned. Mass. Admin. Code tit. 105 §§ 650.017 & 650.020 (1979). UFFI is banned because it allegedly emits formaldehyde but formaldehyde itself is still permitted in commerce in Massachusetts. How can Massachusetts legitimately or rationally seek to protect its residents from formaldehyde vapors by banning UFFI, but not formaldehyde, when every Massachusetts residence contains numerous products that emit substantial quantities of formaldehyde?

There may be instances when the existence of a definite, tangible benefit flowing from administrative action is not subject to empirical proof. In this case, however, such proof is possible and in its absence C.P. believes Massachusetts' interest in the Regulations is "illusory." *See Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 671 (1981). Like the truck-length regulations invalidated in *Raymond Motor Transportation* and *Kassel*, the Regulations "cannot be said to make more than the most speculative contribution" to the health and safety of the state's residents. 434 U.S. at 447. The Commissioner must rely on more than unconfirmed consumer testimony to establish the existence of a local benefit and to impose a grossly disproportionate burden on commerce.

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[6] Indeed, to the extent any conclusion about a threshold can be reached, it should be that no ill effects result from exposures below 0.1 ppm, since every scientific opinion in the record is in agreement that one does exist, and the trial court found that 0.1 ppm does not exceed that threshold. *Borden, Inc. v. Frechette*, No. 38508, Slip op. at 23 (Mass. Super. Ct. Jan. 12, 1982) (App. D).

Agency action without empirical support is also opprobrious when viewed in context with its effects on the regulated community. The effect of the Regulations upon C.P. and the other petitioners can hardly be described as incidental and thus justifying the burden. Although C.P. is a national firm that offers its products for sale in approximately 20 states, C.P. derived a significant percentage of its revenues from the sale and installation of Tripolymer in Massachusetts prior to promulgation of the Regulations. The Regulations totally eliminated that source of revenue, resulting in a substantial reduction of C.P.'s revenues. Moreover, the Regulations had a deleterious effect upon the public perception of Tripolymer and other foam insulation products and it has become correspondingly more difficult for C.P. to market its products in other states. The notoriety of the ban is nationwide; even *Time* published a report of Massachusetts' action. Thus, the Regulations significantly burden C.P. and UFFI manufacturers by imposing substantial additional expenditures and unnecessarily reducing revenues. The economic injury to these companies can hardly be said to create only an "incidental" effect upon interstate commerce, especially since there appears to be no legitimate empirical support for this injury.

In *Pike v. Bruce Church, Inc.*, this Court considered whether a state regulation which effectively required a commercial farming company to spend $200,000 to construct a new packing facility imposed a substantial burden on interstate commerce. Pike, the state official charged with enforcing the Arizona Fruit and Vegetable Standardization Act, had issued an order prohibiting the company from transporting uncrated cantaloupes from its Parker, Arizona ranch to a nearby packing facility in California and requiring instead that the fruit be packaged in Arizona. This Court rejected the state's argument that the order regulated only interstate activity, finding instead that it affected and burdened inter-

state commerce. Although the Court accepted as legitimate the state's primary purpose of promoting and preserving the reputation of Arizona growers by prohibiting deceptive packaging, it found that the tenuous state interest in enhancing the reputation of local producers by attaching Arizona labels to the exceptionally high-quality fruit which the company produced could not constitutionally justify the requirement that the company spend $200,000 to build and operate an unneeded packing plant in Arizona. *Pike* teaches that C.P.'s existing and potential future losses, which are already far greater than $200,000, impose substantial burdens on commerce.[7] Those burdens must be balanced by benefits that can be established by at least some valid empirical data.

Finally, even assuming that the Regulations will effectuate a legitimate public interest, it still must be determined whether the burden is clearly excessive in relation to that interest and whether the burden can be reduced by the adoption of less restrictive alternatives. *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970); *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1980). When one considers the dubious efficacy of the ban as a health measure, the extent of the financial loss which it inflicts upon C.P., and the fact that it completely prohibits the flow of a useful product into Massachusetts, it is evident that the burden outweighs any putative benefit arising from a ban as opposed to a less restrictive alternative.

In opinions sustaining less drastic state measures, this Court has implied that prohibition of an article from commerce would have been excessive in relation to the local benefits. For example, in *Minnesota v. Clover Leaf Creamery Co.*, the Court found that a statute banning

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[7] Clare H. Reinbergen, Secretary-Treasurer of C.P., testified that the Regulations had a devastating effect on C.P.'s business in the state of Massachusetts and in other states.

the retail sale of milk in plastic containers, but not in other containers, placed a relatively minor burden on interstate commerce because "[m]ilk products may continue to move freely across the Minnesota border." 449 U.S. at 472. In contrast, UFFI may not enter Massachusetts in any form.

At the administrative hearings and again at trial, C.P. offered less restrictive regulatory approaches to protect Massachusetts residents from formaldehyde fumes, including a consent agreement that would impose strict standards on the industry. The trial court found that Tripolymer can be properly installed to prevent any vapor problems, App. D at 18, but the Commissioner never even considered C.P.'s proposals. He concluded that administrative data was inadequate to determine whether proper installation would avoid vapor problems. The Commissioner's refusal to consider less restrictive alternatives and his placement of the burden on industry to disprove adverse effects do not represent any attempt to impose a lesser burden on interstate commerce.

The opinion in *Kassel* indicated that health regulations must be supported by more than speculative evidence. Although that case indicates that courts must examine evidence carefully, particularly when a prohibition is involved, this Court has not provided guidance on what that means in the context of scientific evidence to support a product ban. There is no well defined standard for judging when a state health interest is illusory because the supporting evidence lacks a sufficiently reliable scientific basis. C.P. urges that in cases involving outright prohibitions of interstate goods because of potential medical problems the state's action must be supported by some reliable scientific evidence in the record and, at the very least, the state must consider in good faith whether less restrictive alternatives are equally effective.

In this case, Massachusetts has imposed a substantial and unreasonable burden on interstate commerce by banning, rather than regulating, a large industry that provided service, goods and substantial energy savings to several thousand Massachusetts residents. This action has caused extreme financial hardship and was taken without the benefit of any reliable empirical evidence and in contempt of less restrictive, but equally efficacious, alternatives. It raises the specter of other states banning other useful consumer products on the basis of unconfirmed consumer complaints and imposing further unacceptable burdens on interstate commerce.

CONCLUSION

For the reasons stated above, the Appellant C.P. Chemical Company, Inc. respectfully prays that this Court note probable jurisdiction of this appeal.

Respectfully submitted,

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APPENDIX A

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH
AT BOSTON

No. 2849

BORDEN, INC.

vs.

COMMISSIONER OF PUBLIC HEALTH
(and four consolidated cases [1]).

November 1, 1982

April 12, 1983

Present: HENNESSY, C. J., WILKINS, NOLAN, LYNCH, & O'CONNOR, JJ.

CIVIL ACTIONS commenced in the Superior Court Department, two on November 16, 1979, and one each on May 9, 1980, February 9, 1981, and July 31, 1981.

The cases were heard by *Ronan*, J.

The Supreme Judicial Court granted requests for direct appellate review.

Stephen S. Ostrach, Assistant Attorney General (*Gerald J. Caruso*, Assistant Attorney General, with him) for Commissioner of Public Health.

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[1] Aerolite SPE Corporation & others vs. Commissioner of Public Health. Formaldehyde Institute & others vs. Commissioner of Public Health. Anderson Foam Distributors & others vs. Commissioner of Public Health. The Berkshire Gas Company vs. Commissioner of Public Health.

John J. Curtin, Jr. (*Michael W. Davis*, of Illinois, with him) for Borden, Inc.

Joseph L. Kociubes (*Alexandra Leake* with him) for Formaldehyde Institute.

Michael S. Marcus, of Washington D.C., for C.P. Chemical Company, Inc.

Wendall J. Leary for Berkshire Gas Company.

NOLAN, J. These appeals raise numerous procedural and substantive facial challenges to regulations issued by the Commissioner of the Department of Public Health (commissioner), banning the sale, distribution, and all uses of urea-formaldehyde foamed-in-place insulation (UFFI) in the Commonwealth (ban regulations), and requiring the manufacturers, dealers, and installers of UFFI to remove it from any building where it was installed, restore the house, and refund the purchase price (repurchase regulations). The commissioner's regulations were based on his findings that formaldehyde and UFFI were toxic, irritant, hazardous substances and that the potential for release of formaldehyde from UFFI into the indoor environments of buildings in which it is used as insulation justified its ban. In promulgating these regulations, the commissioner purported to act under the authority granted him by G. L. c. 94B. After trial, a judge of the Superior Court invalidated the regulations in their entirety. The two main challenges concern whether the Commissioner was required to hold adjudicatory hearings prior to issuing the regulations and whether the regulations are illegal, arbitrary, or capricious. We reverse the judgments of the Superior Court and uphold the commissioner's regulations with the exception detailed below. Other issues raised on this appeal will be set forth as they are treated in this opinion.

1. *General background.* The trial judge made the following findings. Formaldehyde is a colorless, gaseous compound of carbon, hydrogen, and oxygen. It is present,

with other aldehydes, in the atmosphere, where it is continuously introduced through natural processes of photochemical generation in plants. Automobiles also inject formaldehyde into the atmosphere as a by-product of the incomplete burning of hydrocarbon fuels. It is produced by emissions from industrial and power plants, by smoking, by the use of gas stoves, and even by the heating of cooking oils. Formaldehyde is found in fruits and vegetables such as apples and potatoes. Formaldehyde is also found in mammals; it is produced in the human system during metabolism but it does not accumulate. It is probable that ambient levels of formaldehyde are greater in urban than in rural environments.

Formaldehyde is the most commercially significant form of the aldehydes. About half of the eight billion pounds produced annually in this country is used in the preparation of urea-formaldehyde and phenol formaldehyde resins. These resins are useful for their bonding properties, and they are used in the production of plywood, particle board, and a wide variety of molded or extruded plastic items. Another twenty-five per cent of the formaldehyde produced is used in disinfectants, textile treatment agents, leather processing, and dye manufacture. Formaldehyde is also a constituent of fertilizers, fungicides, clothing, cleansers, waterproofing, fur, wood and leather preservers, lacquers, varnishes, paper, film, glues, drugs, cosmetics, and deodorants.

The use of UFFI as an insulation material began in Europe in 1958. While it was used extensively in northern Europe in the 1960's, its use did not develop in this country until after the Arab oil embargo in 1974. It was marketed with increasing success until 1978 when there was a significant decrease in sales. Some 400,000 houses in the United States have been insulated with UFFI. Approximately 1,260 houses in Massachusets have been insulated with Insulspray, a trade name for one of the UFFI products here at issue, and some 860 with Tripolymer, a trade name for another product involved here.

The number of houses in Massachusetts insulated with other UFFI products is unknown.

The advantages of UFFI are that it is efficient, easy to handle and transport, and relatively inexpensive. The average cost of insulating a seven room house with UFFI ranges from $1,200 to $1,400. UFFI is comprised of three main ingredients: a polymerized urea-formaldehyde resin, a foaming agent called a surfactant, and air. These ingredients are mixed at the job site using portable equipment. The foaming agent is pumped into a mixing or foaming gun where it is mixed with air to form small bubbles. These bubbles are then coated with the resin which enters the gun through a separate line. The coated bubbles are then forced through the gun into wall cavities through small holes cut into the wall for that purpose. At first, the coated bubbles have the appearance and consistency of shaving cream, but the foam soon begins to harden or cure until it becomes firm and self supporting. Subject to conditions of temperature and humidity, the curing process is usually complete in a few days. The quality of the over-all product depends on the quality of the ingredients, the correctness of the mixture, the age and viscosity of the resin, and the temperature at which the foaming occurs.

The disadvantage of UFFI is that it releases, or "off-gases," formaldehyde vapor. The quality, mixture, age, handling, temperature and method of installation of the product, as well as the use of vapor barriers and the physical characteristics of the house, are all factors contributing to the amount of formaldehyde that will be released, or off-gassed, into the house or outside environment. Although the trial judge did not find, he noted there was evidence before the commissioner to suggest that even properly installed UFFI is likely to emit formaldehyde. The potential danger of this formaldehyde "off-gassing" is a subject of much scientific debate and is at the heart of the present controversy.

2. *The prior administrative and judicial proceedings.* The Department of Public Health (department) began investigating the release of formaldehyde from UFFI in the summer of 1978. On February 22, 1979, the commissioner announced that the department would hold hearings in late March on a proposed ban of UFFI. Prior to the hearings, a number of the present plaintiffs objected to the procedure outlined in the commissioner's notice, and requested an adjudicatory hearing, or, in the alternative, certain other procedural safeguards. These requests were denied. Hearings were held on March 29 and 30, 1979. On November 1, 1979, the commissioner, acting under the authority of G. L. c. 94B, §§ 1, 2 & 8, issued regulations effective November 14, 1979, which declared formaldehyde and UFFI to be toxic and hazardous substances, banned the sale of UFFI, and required its repurchase in certain circumstances. 105 Code Mass. Regs. 650.000-650.990 (1979). The commissioner also released a detailed summary of the evidence and findings and conclusions concerning formaldehyde and UFFI (commissioner's findings). On November 16, Aerolite SPE Corporation (Aerolite), C.P. Chemical Company, Inc. (C.P. Chemical), Borden, Inc. (Borden), and others commenced actions in the Superior Court in Suffolk County against the commissioner challenging the ban and repurchase regulations. The commissioner and some of the parties thereafter entered into a stipulation whereby the commissioner agreed to stay the effective date of the repurchase regulations while the industry agreed to forgo seeking a preliminary injunction against the ban regulations. On May 9, 1980, the Formaldehyde Institute (Institute) and others commenced an action. The commissioner had scheduled further hearings to consider the repurchase regulations. The hearings were held on December 19, 1979, and on August 1, 1980. Motions by the parties for adjudicatory hearings or other procedural devices were again denied. On November 6, 1980, the commissioner issued revised repurchase regulations. 105

Code Mass. Regs. 650.220(3) and 650.222 (1980). These regulations, effective November 20, 1980, created a procedure for repurchase commencing when the owner of a building allegedly insulated with UFFI requested repurchase. The class of persons entitled to request repurchase was more limited than the class created in the original repurchase regulations, and an informal referee review process was established to determine, at the request of the affected industry member, whether the person requesting repurchase met the regulatory criteria.

Following issuance of these regulations, the plaintiffs in the actions by Borden and the Institute amended their complaints to challenge the revised repurchase regulations. Anderson Foam Distributors (Anderson) and a number of UFFI installers joined in a new action to challenge only the repurchase regulations. Only one of the plaintiffs in the Aerolite action, C.P. Chemical, renewed its claim against the repurchase regulations with an amended complaint.

The parties in the Borden action jointly moved that the case be specially assigned to a judge of the Superior Court to hear and decide all issues. The motion was allowed and on the commissioner's motion the case was consolidated with the three other cases challenging the regulations.

On July 31, 1981, the Berkshire Gas Company (Berkshire) commenced an action challenging the revised repurchase regulations and claiming as well that its involvement with UFFI did not fall within the reach of the regulations. This case was consolidated with the other four.[2]

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[2] It is apparent that the Berkshire Gas Company did not manufacture or install UFFI. However, the trial judge found that it promoted the use of UFFI for its residential customers beginning in 1975. Initially, Berkshire referred customers to a specific private installer and received a referral fee. Approximately 122 houses were insulated under this arrangement. In late 1976 or early 1977, Berk-

The consolidated cases were heard over nineteen trial days in September and October, 1981. During trial, the judge excluded evidence offered by the commissioner concerning the potential carcinogenicity of formaldehyde.[3]

On January 18, 1982, the judge issued his findings, rulings and order (judge's findings), and, on January 29, 1982, he entered judgment invalidating the challenged regulations in their entirety. Relevant portions of the judges findings are discussed below. The judge denied

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shire ended the referral arrangement and began to negotiate and contract directly with its customers for installation. Berkshire then sub-contracted installation work to a private installer for a portion of the contract price with the customer, which was paid to Berkshire. Approximately 160 houses were insulated this way. About June, 1977, Berkshire terminated its arrangement with this sub-contractor. It then began to purchase quantities of UFFI ingredients from Celsius Resources, Inc., and it maintained a supply of UFFI in its warehouse. Berkshire continued to promote use of UFFI among its customers and to negotiate and contract directly with them. Berkshire would sub-contract the actual installation with an installer approved by Celsius, and the installer would be Berkshire's supply of UFFI ingredients. Another 160 or so houses were insulated under this arrangement. Berkshire ceased contracting for installation of UFFI after March, 1979.

Berkshire asserts in its brief that it did not distribute, manufacture, or install UFFI but that it is nevertheless subject to the repurchase regulations. Although the judge made the above findings relative to Berkshire's promotional and contractual involvement with UFFI installation, he did not rule whether this activity fell within the ambit of the repurchase regulations. Because Berkshire does not argue here that it should not be subject to the repurchase regulations, we deem the issue waived. Mass. R. A. P. 16(a)(4), as amended, 367 Mass. 921 (1975). The commissioner does not challenge Berkshire's standing; therefore, we assume, without deciding, that Berkshire has standing to assert this appeal.

[3] The commissioner had stated in his findings that he did not rely on evidence of carcinogenicity in finding that UFFI was a hazardous substance but he had noted that carcinogenic evidence "provides an additional reason why formaldehyde and UFFI are toxic and hazardous and buttresses the findings concerning the danger posed by formaldehyde and UFFI."

the commissioner's motion to stay the judgment against the ban regulations, but he granted a temporary stay to allow the commissioner to seek a stay pending appeal. The commissioner appealed from the judgment to the Appeals Court on February 3, 1982. The Appeals Court continued to stay as to the ban regulations until further order. That stay is presently in effect due to the collective suggestion filed in the Appeals Court by all parties, and treated by that court as a stipulation. This court subsequently allowed separate applications for direct appellate review. We reverse the judgments of the Superior Court.

3. *Right to an adjudicatory hearing.* The plaintiffs contend that as to the commissioner's decisions to ban UFFI and to compel the product's repurchase from consumers, they were entitled to an adjudicatory proceeding under the State Administrative Procedure Act (G. L. c. 30A), the Federal Hazardous Substances Act (15 U.S.C. §§ 1261-1274 [1976]), and the Federal and State Constitutions. See G. L. c. 30A, § 1(1) (definition of adjudicatory proceeding). The trial judge so held. We disagree.

First, the plaintiffs argue that G. L. c. 94B required an adjudicatory hearing. They contend that as c. 94B, § 2, required the commissioner to promulgate regulations in conformity, in so far as practicable, with regulations established pursuant to the Federal Hazardous Substances Act, and as that Act arguably requires an adjudicatory hearing prior to the banning of a product, G. L. c. 94B likewise requires an adjudicatory hearing. We disagree.

General Laws c. 94B, § 2, as appearing in St. 1972, c. 506, § 1, provides in relevant part, "The commissioner shall cause the regulations promulgated under this chapter to conform, insofar as practicable, with the regulations established pursuant to the Federal Hazardous Substances Act." The statutory language does not require conformity with Federal administrative procedure. We decline to

read such a requirement into the plain language of G. L. c. 94B, § 2. We read the statutory language quoted above as ensuring that the Commonwealth's regulation of a particular substance be harmonious with any Federal regulation of the same product. In light of the State law of administrative procedure embodied in G. L. c. 30A, we do not read the above quoted language as reflecting a legislative intent to incorporate the Federal law of administrative procedure into the State regulation of hazardous substances.

The plaintiffs also argue that G. L. c. 30A required the commissioner to hold an adjudicatory hearing. They argue that the proceeding before the commissioner was a proceeding against a specific res, UFFI, and conclude that where that res had an obvious spokesman (The National Association of Urea-Formaldehyde Insulation Manufacturers, [NAUFIM]), such a proceeding should be conducted in accordance with the procedures governing adjudicatory proceedings. We disagree.

An administrative agency may act either by adjudications or by rule-making. "[T]he choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency." *Arthurs* v. *Board of Registration in Medicine*, Mass. Adv. Sh. (1981) 849, 863, quoting *SEC* v. *Chenery Corp.*, 332 U.S. 194, 203 (1947). General Laws c. 30A, § 1(1), as amended by St. 1966, c. 497, defines an adjudicatory proceeding as "a proceeding before an agency in which the legal rights, duties or privileges of specifically named persons are required by constitutional right or by any provision of the General Laws to be determined after opportunity for an agency hearing." As we said in *Labor Relations Comm'n* v. *Fall River Educators' Ass'n*, Mass. Adv. Sh. (1981) 297, 302, "[a]n adjudicatory proceeding is one in which a statutory or constitutional direction dictates an agency hearing." On the other hand, a regulation is

defined as "the whole or any part of every rule, regulation, standard or other requirement of general application and future effect . . . adopted by an agency to implement . . . the law enforced or administered by it . . . ." G. L. c. 30A, § 1 (5), as amended through St. 1974, c. 361, § 1. The conceptual borders dividing adjudication and regulation have not yet been clearly drawn, and such a clear division may well be impossible of achievement.

However, a three-pronged analysis is appropriate in these cases. First, are the "legal rights, duties or privileges of specifically named persons" at issue? If so, does any provision of the General Laws require that such rights, duties, or privileges be determined after an agency hearing? If not, does any constitutional provision require that such rights, duties, or privileges be determined after an agency hearing? G. L. c. 30A, § 1 (1).

Resolution of the first question is dispositive of the issue with respect to the ban regulations. There are no "specifically named persons" whose rights, duties or privileges are being determined. In pursuit of the goal of protecting the public health and safety, the commissioner declared UFFI to be a banned hazardous substance and ordered its removal from commerce. G. L. c. 94B, § 2(*d*). He did not purport to determine the legal rights, duties, or privileges of any named persons.[4] As such, the proceeding was not an adjudicatory proceeding within the meaning of G. L. c. 30A, § 1(1).

However, as to the regulation ordering the repurchase of UFFI,[5] a hearing as required by the Federal and State Constitutions in those circumstances in which a consumer asks the commissioner to require a certain named sup-

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[4] We do not view NAUFIM, the urea-formaldehyde trade association, as being a "specifically named person" whose interests were at issue.

[5] Such a result is compelled by an analysis of the same factors explained above.

plier[6] to repurchase identified UFFI from such consumer. This type of proceeding will be one in which the legal rights and duties of specifically named persons are required by the Federal and State Constitutions to be resolved through an adversary procedure. Therefore, under the State Administrative Procedure Act and concepts of procedural due process, the commissioner must conduct an adjudicatory proceeding to determine whether a named supplier furnished the UFFI in question, and is, therefore, subject to an order compelling its repurchase.

The commissioner's repurchase regulations provide that, at the request of the supplier, the consumer and the supplier of the UFFI may submit written materials to the department. 105 Code Mass. Regs. 650.222(E)(1)-(6) (1980). These materials will be forwarded to a medical referee and to a legal referee selected by the commissioner. *Id.* 650.222(E)(7). The medical referee shall review the material and shall determine whether the consumer suffered adverse health symptoms after or during exposure to UFFI and whether such symptoms are characteristic of formaldehyde exposure. *Id.* 650.222(E)(9)(a). Likewise, the legal referee shall review the materials and shall determine the following issues: whether the consumer owned a UFFI insulated building, *id.* 650.222(E)(9)(b)(1); whether the UFFI was installed in the building, *id.* 650.222(E)(9)(b)(2); whether the request for repurchase was timely filed, *id.* 650.222(E)(9)(b)(3); whether the person adversely affected by the UFFI is an occupant or former occupant of the UFFI insulated building, *id.* 650.222(E)(9)(b)(4); and whether the named supplier furnished the UFFI of which repurchase is requested, *id.* 650.222(E)(9)(b)(5). These

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[6] For the sake of clarity, we shall use this term to include, where appropriate, the manufacturers, installers, dealers, and other distributors of UFFI who fall within the commissioner's regulations. We shall use the term "supply" to include, where appropriate, manufacture, install, deal, and distribute.

findings shall be made "unless the [referees conclude] that the record clearly and convincingly demonstrates that [the findings] are untrue." *Id.* 650.222(E)(9)(a) & (b). Once these findings have been made, the commissioner shall issue a "Certificate of Right to Repurchase" entitling the consumer to a repurchase of the UFFI. *Id.* 650.222(E)(9)(c) & (F)(1).

We conclude that insofar as the regulations do not require the legal referee to conduct an adjudicatory hearing with respect to the issue of whether the named supplier in fact supplied the UFFI of which repurchase is sought, such regulations are deficient because in such a circumstance the rights, duties, and privileges of a "specifically named" person are required by due process principles to be determined after a trial-type hearing. *Id.* 650.222(E)(9)(b)(5). This factual issue is not a political question, but, rather, an adjudicative question which depends, for its resolution, upon the examination of specific facts relating to a particular supplier and consumer. Under these circumstances, procedural due process based on ordinary principles of fairness requires the agency to conduct an adjudicatory hearing on such issue. *Milligan* v. *Board of Registration in Pharmacy*, 348 Mass. 491, 499 (1965). With the qualification that an adjudicatory hearing is required to determine the factual issue as to who supplied the particular UFFI in question, we hold that the repurchase regulations are, with respect to the right to an adjudicatory hearing, constitutional and consistent with G. L. c. 30A, § 1(1).

The reason that an adjudicatory hearing is required only with respect to the issue of what supplier furnished the UFFI of which repurchase is sought is based on a proper interpretation of G. L. c. 94B, § 8. Once a product is banned under c. 94B, § 2, such product "*shall*, in accordance with regulations of the commissioner, be repurchased . . . ." G. L. c. 94B, § 8. The only limitation which the Legislature placed on this mandatory requirement of

repurchase is that no manufacturer, distributor, or dealer shall be required to repurchase any particular UFFI except "from the person to whom he sold it . . . ." G. L. c. 94B, § 8(a)-(c). Pursuant to the authority delegated to the commissioner, the commissioner has the power to require that all UFFI be repurchased subject only to the proviso that no one shall be compelled to repurchase UFFI which it did not supply. This statutorily delegated power does not depend upon whether the consumer owned a UFFI insulated building, whether the UFFI was installed in the building, whether the request for repurchase was timely filed, whether the person adversely affected by the UFFI is an occupant or former occupant of the UFFI insulated building, whether an occupant or former occupant of a UFFI insulated building experienced adverse health symptoms, whether such symptoms occurred or were aggravated after exposure to UFFI as an occupant of a UFFI insulated building, whether such symptoms occurred while the occupant was present in a UFFI insulated building, or whether the occupant's symptoms are characteristic of exposure to formaldehyde. Thus, the commissioner's requirement that these eight issues be resolved through the referee procedure is purely gratuitous. Accordingly, the plaintiffs may not prevail on the contention that the commissioner was compelled to go further and require an adjudicatory hearing with respect to these issues. See discussion *infra* at 729-732.

Two consequences flow from our decision that a limited adjudicatory hearing is required. First, this right to an adjudicatory hearing requires that the supplier from whom repurchase is sought has the right to examine and cross-examine witnesses on the issue whether the company actually supplied the UFFI. Second, this right by necessity implies the concomitant right, exercisable prior to the hearing, to inspect the UFFI so that the supplier may determine whether there is a viable factual dispute on that point.

4. *Review of commissioner's regulations.* (A) *The ban regulations.* Unless an exclusive mode of review is provided by law, judicial review of agency regulations is to be gained through a petition for declaratory relief. G. L. c. 30A, § 7. There being no exclusive mode provided in G. L. c. 94B or elsewhere, an action for declaratory relief under G. L. c. 231A is the appropriate procedure to challenge the commissioner's regulations. Because we think that the plaintiffs failed to prove that the commissioner lacked any conceivable, rational basis for the regulations, we reverse the judge's ruling that the ban regulations are invalid.[7]

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[7] The commissioner urges that it was error for the trial judge to deny his motion for summary judgment which was based on his contention, as stated in his brief, "that the evidence compiled in the administrative hearings unquestionably demonstrated that there was not only a conceivable, but an actual, basis for the Commissioner's action."

In *Consolidated Cigar Corp.* v. *Department of Pub. Health*, 372 Mass. 844 (1977), we implicitly recognized that summary judgment may be appropriate in actions for declaratory relief "where litigation focuses on the power of an administrative agency to act as [it] did . . . ." *Id.* at 855. See *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 464 n.8 (1981), and *Shell Oil Co.* v. *Revere*, Mass. Adv. Sh. (1981) 1285, 1291 n.11 (courts express no view whether summary judgment would have been apprppriate in challenges to State law and municipal ordinance, respectively). See also *Commonwealth* v. *Leis*, 355 Mass. 189, 202 (1969) (Kirk, J., concurring). Cf. *Ciszewski* v. *Industrial Accident Bd.*, 367 Mass. 135, 139 (1975). Given the focus of the litigation here, however, we think the judge did not err in denying the motion. The plaintiffs do not challenge the power of the commissioner to ban hazardous products and to order repurchase. Rather, they contend that the commissioner had no rational, conceivable ground to ban UFFI on the basis of the current scientific information concerning its hazard and the dangers of formaldehyde. There was a material issue of fact, namely whether the state of scientific information concerning UFFI and formaldehyde was such that the commissioner would have been arbitrary or capricious in relying upon it. We note that both at trial and before this court the commissioner has preferred to rest his argument essentially on the soundness of his regulations

We take this opportunity to set forth, once again, the guiding principles for judicial review of agency regulations. We begin by noting that an agency's power to make regulations is delegated by the Legislature. See *Pacific States Box & Basket Co.* v. *White*, 296 U.S. 176, 185-186 (1935); *Commonwealth* v. *Diaz*, 326 Mass. 525, 527 (1950). Acting upon this delegation, an agency may, unless specifically prohibited, properly base its regulatory decisions on the same kinds of "legislative facts" on which the Legislature could rely in its enactment of a statute. See 4 K.C. Davis, Administrative Law § 15.03 (1958). Cf. *Grocery Mfrs. of America, Inc.* v. *Department of Pub. Health*, 379 Mass. 70, 79-80 (1979); *Cast Iron Soil Pipe Inst.* v. *State Examiners of Plumbers & Gas Fitters*, 8 Mass. App. Ct. 575, 586 (1979), and cases cited. A regulation is essentially an expression of public policy. See *Grocery Mfrs. of America, Inc.* v. *Department of Pub. Health*, *supra*. The issue on review is not whether the regulation was supported by substantial evidence in the record before the agency. *Massachusetts State Pharmaceutical Ass'n* v. *Rate Setting Comm'n*, 387 Mass. 122, 126 (1982). *Grocery Mfrs. of America, Inc.* v. *Department of Pub. Health*, *supra* at 80. *Greenleaf Fin. Co.* v. *Small Loans Regulatory Bd.*, 377 Mass. 282, 293 (1979). Indeed, "[f]acts represented in material submitted to an agency, unless stipulated as admitted, may not be relied on in a judicial challenge to an administrative regulation." *Grocery Mfrs. of America, Inc.* v. *Department of Pub. Health*, *supra* at 81. Rather, the person challenging

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as based on the scientific information available to him rather than on a hypothetical but rationally conceivable basis. Given this posture of the commissioner's case, and given also the nature and complexity of scientific evidence, we think the judge acted properly in allowing the plaintiffs to proceed. We do not imply, however, that once trial had begun the plaintiffs were relieved in any way of their burden of proving that the commissioner lacked any rational, conceivable basis. We also do not intend to vouchsafe any general statement as to the appropriateness of summary judgment in other challenges to legislative or administrative actions.

the regulation [*sic*] is illegal, arbitrary, or capricious.[8] *American Family Life Assurance Co.* v. *Commissioner of Ins.*, *ante* 468, 477-478 (1983). *Massachusetts State Pharmaceutical Ass'n* v. *Rate Setting Comm'n*, *supra*.

Because the agency proceeding is not an adjudicatory one, cf., *Milligan* v. *Board of Registration in Pharmacy*, 348 Mass. 491 (1965), a plaintiff may not meet its burden "by arguing that the record does not affirmatively show facts which support the regulation." *Purity Supreme, Inc.* v. *Attorney Gen.*, 380 Mass. 762, 776 (1980). *Colella* v. *State Racing Comm'n*, 360 Mass. 152, 156 (1971). "If the question is fairly debatable, courts cannot substitute their judgment for that of the Legislature." *Druzik* v. *Board of Health of Haverhill*, 324 Mass. 129,

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[8] The plaintiffs contend that the court's function is "to determine whether there is any rational basis upon which the regulation can be sustained." We agree. However, we do not agree with the plaintiffs' contentions that in making this determination the court must view the regulations in light of the factors and standards required or deemed relevant under the Federal Administrative Procedure Act. While some of these factors are helpful, others are neither necessary nor appropriate under this State's Administrative Procedure Act. Cf. *Grocery Mfrs. of America, Inc.* v. *Department of Pub. Health*, 379 Mass. 70, 80 (1979) (State agency need not make findings of legislative facts in the record of regulatory proceeding although Federal agency would be so required). The United States Supreme Court itself did not rely on these factors when it recently upheld the validity of State legislation banning the use of plastic, nonrefillable milk containers. *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456 (1981). Instead, the Court reviewed the State's claims for justification of the law and noted that it must uphold the legislation "[i]f any one of the four [reasons] substantiates the State's claim." *Id.* at 465. Finding that "in view of the evidence before the legislature, the question clearly is 'at least debatable.' *United States* v. *Carolene Products Co.*, 304 U.S. [144], 154 [1938]," the Court reversed the Minnesota Supreme Court's decision invalidating the ban and held that that court had "erred in substituting its judgment for that of the legislature" even though it may have been correct that the ban was not a "sensible means" of achieving the conservation goals that the Legislature had in mind when it enacted the law. *Id.* at 469.

136 (1949). A plaintiff must prove "the absence of any conceivable ground upon which [the rule] may be upheld." *Purity Supreme, Inc.* v. *Attorney Gen.*, *supra*,[9] quoting *Druzik* v. *Board of Health of Haverhill*, *supra* at 138. This is so because a properly promulgated regulation has the force of law, *Purity Supreme, Inc.* v. *Attorney Gen.*, *supra* at 768, and must be accorded all the deference due to a statute. *Massachusetts State Pharmaceutical Ass'n* v. *Rate Setting Comm'n*, *supra* at 127. "Thus, [a court] must apply all rational presumptions in favor of the validity of the administrative action and not declare it void unless its provisions cannot by any reasonable construction be interpreted in harmony with the legislative mandate." *American Family Life Assurance Co.* v. *Commissioner of Ins.*, *supra* at 477, quoting *Consolidated Cigar Corp.* v. *Department of Pub. Health*, 372 Mass. 844, 855 (1977). This deference is necessary to maintain the separation between the powers of the Legislature and administrative agencies and the powers of the judiciary. "A court may not substitute its judgment for that of the Legislature if the regulation comports with the power delegated." *Purity Supreme, Inc.* v. *Attorney Gen.*, *supra* at 776. This deference also precludes the possibility that a plaintiff may frustrate administrative policy merely by amassing facts, statistics, and testimony before a judge, all of which have little or nothing to do with the legislative facts which the administrative agency relied upon in making its regulation. "[R]espect for the legislative process means that it is not the province of the court to sit and weigh conflicting evidence supporting or opposing a legislative enactment." *Shell Oil Co.* v. *Revere*, Mass. Adv. Sh. (1981) 1285, 1290-1291. *Clark* v. *Paul Gray, Inc.*, 306 U.S. 583, 594 (1939). Accord, *Minnesota* v.

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[9] This is consistent with the fact that an agency is not, barring a specific statutory mandate, obliged to provide a statement of the reasons which support its adoption of a regulation. *Massachusetts State Pharmaceutical Ass'n* v. *Rate Setting Comm'n*, 387 Mass. 122, 127 (1982).

Clover Leaf Creamery Co., 449 U.S. 456, 464 (1981). See *Sturges* v. *Chilmark*, 380 Mass. 246, 256-257 (1980); *Cambridge Elec. Light Co.* v. *Department of Pub. Utils.*, 363 Mass. 474, 491 (1973) ("[F]or the court to check back on the agency's 'reasons' and 'determination[s]' of fact and law would have an unhealthy tendency to substitute the court for the agency as policymaker").

We turn to the specific mandate here at issue. General Laws c. 94B, § 2(*d*), as appearing in St. 1972, c. 506, § 1, provides that "[i]f the commissioner finds that an article subject to this chapter cannot be labeled adequately to protect the public health and safety, or the article presents an imminent danger to the public health and safety, he may declare the article to be a banned hazardous substance and require its removal from commerce."[10] An article is subject to this chapter if it is a "hazardous substance" as defined in G. L. c. 94B, § 1,[11] or if the commissioner declares it to be a "hazardous substance" in accordance with G. L. c. 94B, § 2(*a*).[12] There are no

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[10] There is no requirement in this section that the commissioner consider less drastic alternatives to a ban.

[11] General Laws c. 94B, § 1, as appearing in St. 1972, c. 506, § 1, defines "hazardous substance" in pertinent part as "any substance or mixture of substances which is toxic, corrosive, an irritant, a strong sensitizer, flammable or which generates pressure through decomposition, heat, or other means, if such substance or mixture of substances may cause substantial personal injury or substantial illness during or as a proximate result of any customary or reasonably foreseeable handling or use . . . ."

The terms "toxic" and "irritant" are further defined elsewhere in § 1.

[12] General Laws c. 94B, § 2(*a*), inserted by St. 1960, c. 727, § 2, provides, "Whenever in the judgment of the commissioner such action will promote the objectives of this chapter by avoiding or resolving uncertainty as to its application, the commissioner may by reasonable rules and regulations declare to be a hazardous substance, for the purpose of this chapter, any substance or mixture of substances which he finds meets the requirements of the same term as defined in section one."

requirements in G. L. c. 94B that the commissioner conduct any specific tests or determine that any specific number of people are or will be affected by a particular substance in making his finding concerning it. Nor is there any indication that the commissioner must hold an adjudicatory hearing before making his finding. The commissioner may act only with respect to those substances concerning which he makes certain findings, but his power to make those findings is limited only in that he must not exercise it illegally, arbitrarily, or capriciously.

The judge found that "[f]ormaldehyde, . . . at some level of concentration, becomes an irritant. . . . [F]urther . . . as this abrasive level of exposure is increased, the exposure level becomes toxic." We accept this finding. Since formaldehyde meets the definition of hazardous substance, we conclude that formaldehyde is properly regulated under G. L. c. 94B. The crux of the issue before us, then, is—as it was before the judge—whether the presence of formaldehyde in UFFI justifies the ban of the latter product. The ban would be justified if the commissioner could rationally find that UFFI could not "be labeled adequately to protect the public health and safety, or [that UFFI] present[ed] an imminent danger to the public health and safety." G. L. c. 94B, § 2(*d*).

We have in the past sustained regulations on the ground that there was a conceivable basis for the agency decision. *Colella* v. *State Racing Comm'n*, 360 Mass. 152, 157 (1971). See also *Shell Oil Co.* v. *Revere*, Mass. Adv. Sh. (1981) 1285, 1292 (upholding municipal ordinance banning self-service gas stations on basis of purposes which city could have had in mind). In this case, we need not go so far.[13] We have examined relevant portions of the

[13] "We note that we are, of course, free to consider the evidence before the Commissioner, as well as any other relevant information, including that provided in the briefs in determining whether there was a rational basis for the Commissioner's regulations." *American Family Life Assurance Co.* v. *Commissioner of Ins.*, *ante* 468, 478 n.6 (1983).

trial transcript, and we conclude that there was evidence presented there which warranted the commissioner's action.

We briefly summarize portions of that evidence. At trial, Dr. Richard Gammage, a chemist, testified that tests conducted at the Oak Ridge National Laboratory on panels of wood foamed internally with UFFI and maintained under conditions which would approximate those of a corner room in a normal house[14] indicated that UFFI emitted formaldehyde into the "room" in levels of concentration which ranged from .03 to about .25 or .3 parts per million. There was also testimony from Dr. George Allen, a professor of fiber and polymer science at the University of Washington, called by the plaintiffs, that a greater amount of formaldehyde is released from UFFI which increases in heat and humidity. The judge found that improper mixing or installation of UFFI could increase the rate of formaldehyde emission. Dr. Murray Cohn, a biochemist at the Consumer Product Safety Commission (CPSC),[15] testified that he conducted statistical tests to compare the average level of formaldehyde in houses that were insulated with UFFI with the average level found in houses not insulated with UFFI. His results indicated that the average level in houses insulated with UFFI was .12 parts per million whereas the average level in noninsulated houses was .03 parts per million.[16] He further testified that he found there

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[14] Dr. Gammage qualified this statement on cross-examination by testifying that if the house did not have the same type of construction as the test panels, it would not be appropriate to directly transpose the date [sic] to the house. He also testified that variables not taken into account in the tests could affect the utility of the test data in certain situations.

[15] Dr. Cohn testified in a private capacity and not as a representative of the CPSC.

[16] The judge noted that studies conducted by the department on 198 houses in Massachusetts whose occupants complained of various

was a ninety-eight percent probability that the difference in levels was real and not due to error in the statistical analysis. A report entitled "Formaldehyde—An Assessment of Its Health Effects" prepared by the National Academy of Sciences and entered as evidence at trial stated that: "[T]he studies of public exposure to formaldehyde in indoor aid [sic] suggest a wide range of sensitivity, with effects reported at 0.01-31.7 [parts per million]." Dr. Andrew Ulsamer, Director of the Division of Health Effects at the CPSC,[17] testified that his opinion, based on his review of the National Academy of Sciences report, was that "there are health effects of formaldehyde at relatively low levels, and if one considers the various sensitive populations that may be involved, that there may indeed be a population threshold at any measurable level of formaldehyde within the general population." [18] He further testified that persons who suffer from asthma, chronic obstructive pulmonary diseases such as emphysema or chronic bronchitis, and persons who are allergic to formaldehyde, would suffer health effects at exposure to levels less than .1 parts per million. He estimated these groups to compose about ten per cent of the population. Finally, he testified that all the symptoms, except ear irritation, that had been listed by the commissioner in his repurchase regulations as characteristic of exposure to formaldehyde were in fact characteristic of such ex-

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symptoms which occurred after installation of UFFI indicated that in twenty-one percent of the houses no level of formaldehyde was found, in seventy-eight per cent of the houses the level was found to be .09 parts per million or less, and in all houses the level was less than .5 parts per million.

[17] Dr. Ulsamer testified solely in a private capacity.

[18] In his findings, the judge noted that a study conducted by a Dr. Alarie and relied on by the commissioner indicated, based on the doctor's extrapolations from animal research, that humans should be exposed to no more than .03 parts per million of formaldehyde in the indoor environment with a preferred level of .003 parts per million.

posure. The judge found that these symptoms were characteristic of exposure to formaldehyde and many other common causes as well. Thus, there was evidence before the judge indicating that UFFI would potentially in some conditions emit formaldehyde into houses at levels above which at least a significant portion of the population would experience adverse health effects.[19]

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[19] The judge made a number of findings concerning these issues: "At the present state of the technical knowledge and expertise, there has been no showing that the ambient level of formaldehyde concentration in houses in which UFFI has been properly installed is significantly more appreciable or different than the level of formaldehyde in similar houses without UFFI. . . . Simply stated, I find as a fact that the present data bank on the toxicology of formaldehyde is too deficient to permit the fixing of exact toxicological standards for formaldehyde exposure based upon reasonable scientific certitude for either the many various industrial or residential environments. I find further that there is in fact a population threshold for the irritant effects of exposure to formaldehyde in houses. Moreover, from the toxicological evidence produced at trial, I find and conclude factually that residential exposure to formaldehyde at levels below 0.1 parts per million is an exposure beneath this undetermined population threshold. I further conclude, insofar as it is a question of fact, that from the data made available to the Commissioner and presently found within its administrative record there is no evidence upon which an agency fact finder would be warranted in concluding that the population threshold for irritant or toxic effects of exposure to formaldehyde is zero. . . .

"Therefore from the epidemiological evidence produced at the trial, insofar as the same is a question of fact, I find there has been no showing that the symptoms focused upon are more prevalent among individuals living in UFFI houses than any other group of residents."

The commissioner disputes the judge's interpretation of the evidence upon which he relied in making some of these findings. We need not enter the fray. However, we do note that these findings relate to facts demonstrable at the time of trial. As such, they do not refute that aspect of the commissioner's evidence at trial which indicated that UFFI potentially will release formaldehyde into buildings at levels greater than .1 parts per million. We think this evidence supports a rational determination that UFFI "presents an

In light of this evidence, we cannot say that the commissioner acted arbitrarily or capriciously in banning UFFI. That the commissioner was unable to determine the amount of formaldehyde that UFFI contributed to the indoor environment, that he did not know how many people in the Commonwealth had been affected by UFFI, that he had not compared the levels of formaldehyde in UFFI and non-UFFI houses, that he had not caused epidemiological studies to be made to determine the incidence of symptoms allegedly caused by UFFI, that experts called by the plaintiff at trial offered evidence contrary to the commissioner's, and that the commissioner's experts

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imminent danger to the public health and safety." G. L. c. 94B, § 2(*d*). Certainly the commissioner need not wait until the danger materializes before taking action. See *Shell Oil Co.* v. *Revere*, Mass. Adv. Sh. (1981) 1285, 1292 (upholding ban of self-service gas stations "[w]hether the ordinance was a response to actual instances of customer misuse or an attempt to forestall such problems . . ."). The commissioner has a statutory responsibility to "take cognizance of the interests of life, health, comfort and convenience among the citizens of the commonwealth." G. L. c. 111, § 5. Some doubts whether UFFI properly installed in houses will cause the symptoms characteristic of exposure to formaldehyde need not stay the commissioner's hand. Cf. *Commonwealth* v. *Leis*, 355 Mass. 189, 195 (1969) ("We do not think that the present unavailability of or inability to collect absolute, statistical and scientific proof that the smoking of marihuana (1) triggers 'psychotic breaks,' (2) leads to the use of more dangerous drugs and (3) causes automobile accidents prevents the Legislature from acting to prohibit its use"). Indeed, the commissioner might well have acted irresponsibly had he ignored the mounting evidence of the dangers of formaldehyde exposure. Cf. *Washington State Farm Bureau* v. *Marshall*, 625 F.2d 296, 306 (9th Cir. 1980), where the court stated that, "[g]iven [the Secretary's] clear statutory mandate to protect the children, it would have been reasonable—if not imperative—for him to prefer the advice of the more cautions expert opinions, which were based on an independent review of available data." The case involved the Secretary of Labor's regulatory ban of the use of certain pesticides. We note also that the Consumer Product Safety Commission has recently banned the use of UFFI in houses and schools. 47 Fed. Reg. 14, 366 (1982) (to be codified at 16 C.F.R., part 1306).

significantly qualified their testimony on cross-examination[20] does not obviate the fact that he had a rational and certainly conceivable basis for his decision.[21]

(B) *The repurchase regulations.* The plaintiffs contend that the commissioner's repurchase regulations are arbitrary and capricious because they fail to afford fundamental procedural safeguards. They do not contend that these regulations result in a taking of property in violation of their substantive due process rights. We have earlier stated that those suppliers of UFFI who are asked to repurchase the product are entitled to an adjudicatory hearing to determine whether the particular UFFI complained of was sold by them. In this section, we deal with the plaintiffs' other objections. The plaintiffs claim that

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[20] We can conceive of circumstances where scientific evidence could be so severely impeached as to render any reliance upon it unreasonable. This is not the case here, especially given the inherently tentative nature of most scientific inquiry.

[21] We find no relevance in the fact, if it is one, that, in the judge's words, the commissioner shifted "the burden away from the proponents of the ban and deposit[ed] it upon the industry without notice at the time of the hearing." The judge made this conclusion on the basis of statements in the commissioner's findings of which the following is an example:

"Opponents have claimed that proper installation will eliminate formaldehyde . . . (but) . . . have not substantiated these claims with scientific tests or other evidence . . . (nor) . . . demonstrated UFFI can be properly installed. . . . Nor do I have evidence showing what installation procedure will control vapor problems or whether these procedures will eliminate vapor emissions from the insulation. I therefore cannot conclude that improper installation necessarily accounts for the formaldehyde problems experienced in UFFI."

While the commissioner's implicit placement of the burden on the industry may have consequences in the context of the adjudicatory hearing which the judge believed was required, the question of "burden" has no meaning in the context of a regulatory hearing. The mere fact that the commissioner couched his findings in language which would indicate that the industry had a burden of proof would not affect the appropriateness of his actions if, in fact, there existed a reasonable, conceivable basis to support them.

the regulations are invalid because they prohibit the plaintiffs from showing the amount, source or relative level of any ambient formaldehyde in a house, or that no occupant of the house suffered UFFI related symptoms. These objections are more properly directed toward the statute from which the commissioner draws his power to issue the regulations. Once a substance has been banned as a hazardous substance under G. L. c. 94B, the supplier of the substance has the absolute obligation under G. L. c. 94B, § 8 to repurchase his product in accordance with regulations promulgated by the commissioner. The only questions that need to be answered to establish this obligation are whether the product is a banned hazardous substance and whether the person from whom repurchase is sought was the supplier of the product. The fact that the product is banned forecloses the issue of causation insofar as repurchase is concerned.

In the present cases, the commissioner's regulations specify that the owner of a building insulated with UFFI is not entitled to a "Certificate of Right to Repurchase" if the alleged supplier requests review unless a medical referee determines that an occupant or former occupant did suffer adverse health symptoms characteristic of formaldehyde exposure while in a building insulated with UFFI, 105 Code Mass. Regs. 650.222(E)(9)(a) (1980), and unless a legal referee determines that the person requesting repurchase is the owner of a building insulated with UFFI which was supplied by the party from whom repurchase is requested. *Id.* at 650.222(E)(9)(b). The person seeking repurchase must submit certain specific information showing that he has met the prerequisites for repurchase and naming the supplier from whom repurchase is sought. The supplier may submit evidence tending to show that these prerequisites were not met, and the person seeking repurchase may submit rebuttal evidence. *Id.* at 650.222(E)(4), (5) & (6). Unless the record "clearly and convincingly demonstrates" that the prerequisites are not met, the person seeking repurchase

shall be entitled to a "Certificate of Right to Repurchase." *Id.* at 650.222(E)(9)(a), (b) & (c). The regulations thus limit the right of repurchase, when it is challenged, to those persons who are found to be entitled by this process. In this sense, the regulations define only the rights of the persons seeking repurchase, and the plaintiffs have no standing to challenge the manner in which these rights are determined. Their obligation to repurchase is defined by statute. The fact that the suppliers bear the burden of proof in the proceedings before the referees does not change the character of those proceedings into one which determines the rights, obligations, or duties of the suppliers.

The plaintiffs further contend that G. L. c. 94B, § 8, prevents the commissioner from requiring a supplier to repurchase other than from the person to whom the supplier sold the UFFI and that the regulations which would allow the owner to seek repurchase directly from anyone in the chain of manufacture, dealership, or installation are, therefore, invalid. We do not read that section, or the power delegated to the commissioner under it, so narrowly. Rather than a limitation as to who may be required to repurchase, this section is intended to establish the obligation of those in the chain of supply to repurchase such that the final obligation falls upon the manufacturer (or importer) who brought the product into the marketplace. The fact that a supplier lower in the chain was not required to repurchase does not negate the obligation of a supplier higher in the chain to do so when properly requested. In any event, a supplier who is required to repurchase may, in turn, require repurchase from the person who sold the product to it.[22]

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[22] Each supplier in the chain may pass along, as part of the repurchase price, its "reasonable and necessary" expenses or charges connected with returning the product. G. L. c. 94B, § 8(a)-(c). Because the commissioner's regulations would allow the number of suppliers who must handle the product before it reaches the top of the chain to be minimized, the regulation will, as a practical

The final challenge raised by the plaintiffs is that G. L. c. 94B, § 8, limits the cost of repurchase to a refund of the purchase price paid by the consumer. The argument is that since repurchase of UFFI as defined in the regulations would require its removal from the buildings at a cost far in excess of the actual purchase price,[23] the regulations are invalid. However, it is clear from G. L. c. 94B, § 8(*a*)-(*c*), that the Legislature intended to require reimbursement for "reasonable and necessary" expenses and charges in connection with returning the product to the manufacturer along the chain of supply. We have already stated that the commissioner, by regulation, may cause the chain to begin at some point other than the supplier who finally sells the product to the consumer. We think that the costs specified in the regulations are reasonably and necessarily connected with return of the product along the chain of supply and that the commissioner had the power to structure the regulations so as to pass these costs directly to the appropriate supplier.

5. *Inclusion of tripolymer in ban.* The plaintiff C.P. Chemical argues that the commissioner acted arbitrarily and capriciously in that he included its product, tripolymer, within the ban of UFFI. The gravamen of this argument is that a chemical called phenol is incorporated into the structure of tripolymer and that this chemical alters the chemistry of tripolymer to such an extent that it cannot be classified as a UFFI. Moreover, C.P. Chemical claims that the incorporation of this chemical into tripolymer results in an extremely limited potential for

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matter, probably result in a significant saving to the manufacturer (or importer) who must ultimately bear the final costs of repurchase.

[23] There was testimony at trial that the average cost to remove UFFI from an average seven room house in Massachusetts in the manner specified in the regulations would be as high as $25,000. The judge found that the average cost would be between $12,000 and $14,000.

formaldehyde emission. We reject C.P. Chemical's arguments.

On November 1, 1979, the commissioner issued regulations which banned UFFI. As we stated above, these regulations are not arbitrary or capricious. In December, 1980, C.P. Chemical wrote to the commissioner stating the tripolymer was not a urea-formaldehyde foam insulation as defined in the regulations. The commissioner had determined that tripolymer was a UFFI product and was subject to the ban against all UFFI products and so notified C.P. Chemical. After trial in the Superior Court, the judge found that tripolymer was a UFFI product. He concluded that the introduction of the chemical, phenol, into the structure did not so alter the structure as to take it out of the UFFI family.

The question whether or not tripolymer is a UFFI product is not an issue to be determined *ab initio* by the court. Rather, the question before us is whether there is any rational basis for the commissioner's conclusion that tripolymer is a UFFI product. We conclude that there is a rational basis for the commissioner's decision.

The commissioner viewed the term urea-formaldehyde foam insulation as a generic term encompassing all foam insulation substances containing formaldehyde. The commissioner determined that tripolymer fell within the generic category of formaldehyde insulation products. This determination is supported by the affidavit testimony of an officer of C.P. Chemical who stated that tripolymer is within the generic category of UFFI products.[24] Moreover, C.P. Chemical's complaint alleges that it manufactured products used in the manufacture of formaldehyde-based insulation. At trial the same officer of C.P. Chemical testified that tripolymer contained some formaldehyde. Further, she testified that the finished tripolymer product released formaldehyde into the air. Additionally, an ex-

[24] This affidavit was read in evidence at trial.

pert retained by C.P. Chemical admitted at trial that tripolymer contained formaldehyde, and that such formaldehyde could be released into the air. Another of C.P. Chemical's witnesses testified at trial that tripolymer could potentially release formaldehyde into the air. There was sufficient evidence on which the judge could find that the commissioner was not arbitrary or capricious in concluding that tripolymer is a UFFI product. This ends our inquiry.

As to C.P. Chemical's argument that tripolymer emits such a small amount of formaldehyde into the air that the commissioner's banning it is arbitrary and capricious, we refer to our discussion *supra* at 725-729, rejecting the same argument with respect to UFFI in general. Some doubts as to whether tripolymer will cause adverse health effects to consumers need not prevent the commissioner from acting to protect the public. Cf. *Commonwealth* v. *Leis*, 355 Mass. 189, 195 (1969) (lack of absolute scientific proof does not prevent regulatory action). The commissioner did not act arbitrarily or capriciously.

6. *Prejudgment of case.* The judge concluded that the commissioner had prejudged the case against UFFI. We hold that this conclusion is erroneous.

As we hold today, the proceedings before the commissioner in the cases before us were regulatory and not adjudicatory. One of the consequences which flow from this conclusion is that there is no constitutional, statutory, or common law requirement that the regulatory body commence its inquiry with a tabula rasa. The nature of the rule-making process is such that one may reasonably contemplate that the regulatory body will, either on the basis of some external or internal impetus, determine that a potential problem exists and that further investigation is warranted to determine whether (1) such a problem does, in fact, exist and (2) some regulation is necessary to resolve the problem. *Cambridge Elec. Light Co.* v. *Department of Pub. Utils.*, 363 Mass. 474, 486-487 (1973).

The rule-making process is not an adversary process in which two or more competing parties phrase specific factual and legal issues for resolution by a decision maker. See 1 K.C. Davis, Administrative Law § 7.02 (1958) (discussing requirement of a trial to resolve disputed factual issues). Rather, the system is designed to inform a decision maker so as to allow him to render a decision on the basis of his expertise and on the basis of the information collected. *Cambridge Elec. Light Co.* v. *Department of Pub. Utils.*, *supra* at 486-487. While the adversary process, being adjudicatory in nature, necessitates the impartiality of the decision maker, the rule-making process, being legislative in nature, does not compel an absolutely indifferent decision maker. If the plaintiffs' argument were to prevail in this setting, the result would be to halt the rule-making process because regulatory bodies would not commence investigations where the very decision to investigate would be fatal to any regulation promulgated pursuant to such an investigation.

Indeed, the Legislature has granted the commissioner specific authority to disseminate information to the public concerning hazardous substances when he believes there is a possible public health problem. G. L. c. 94B, § 9(*b*). Moreover, under the State Administrative Procedure Act, the commissioner is required to give public notice which refers to the statutory authority under which the action is proposed and "either state[s] the express terms or describe[s] the substance of the proposed regulation . . . ." G. L. c. 30A, § 2, as appearing in St. 1976, c. 459, § 2. The purpose of this notice is to allow interested parties to provide information to the commissioner.

In the cases before us the commissioner gave notice which described the problem and stated that public hearings would be held to examine the potential health effects of UFFI. We cannot conclude that the commissioner's

adherence to the enabling statute and to the State Administrative Procedure Act constituted a prejudgment of the case against UFFI.

The result we reach today on this issue is consistent with our characterization of the rule-making process in *Cambridge Elec. Light Co.* v. *Department of Pub. Utils.*, 363 Mass. 474 (1973). In that case we said "[p]resumably the department already had an understanding of the billing, termination, and related practices of the gas and electric companies and also an idea of the customer problems related to those practices. The department was in search of current information and arguments as to industry wide experience to supplement and test its own knowledge and to help it shape a workable set of regulations if that was needed." *Id.* at 486-487. The same description adheres to the commissioner's action in the cases before us. The mere fact that the commissioner had some knowledge of the subject and decided to test such knowledge by conducting an investigation does not invalidate the regulations issued pursuant thereto. Therefore, we set aside the judge's conclusion that the case against UFFI was prejudged.

7. *Evidence of UFFI's carcinogenicity.* Our disposition of these cases renders it unnecessary to examine the admissibility of evidence concerning UFFI's potential carcinogenicity. However, because the significance of this issue transcends the instant cases, we shall address it.

The judge excluded evidence offered by the commissioner which tended to show that UFFI's emission of formaldehyde, even in low concentrations, could cause cancer in humans. The judge stated that he excluded the evidence because the commissioner disclaimed reliance upon it.[25] Given the posture of the cases, the judge should have admitted the evidence.

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[25] See note 3, *supra*.

As we have stated above, a regulation promulgated by an administrative agency will be upheld unless the opponents prove at trial that there is no rational basis for the regulation. A court is not concerned with whether there was substantial evidence in a record before the agency, but rather it must determine whether the record made in court discloses that the adoption of the agency regulation was illegal, arbitrary, or capricious. *Massachusetts State Pharmaceutical Ass'n* v. *Rate Setting Comm'n*, 387 Mass. 122, 126 (1982). Accordingly, the commissioner's statement that he did not necessarily rely upon the evidence of UFFI's carcinogenicity for his decision to ban the substance does not preclude him from offering such evidence at trial to prove that there is a rational basis for his regulation. Moreover, although the commissioner is not compelled to establish affirmatively at trial that there is a rational basis for his regulation,[26] there is nothing in our previous cases to preclude him from doing so or to preclude him from introducing evidence before the judge on which he did not specifically rely at the administrative level.[27] Thus, we conclude that the judge should have admitted the evidence.

8. *Federal preemption.* The judge concluded that "there is no basis for the contention that federal law has preempted the field plowed by Chapter 94B." Of the plaintiffs in the cases before us, only one, C.P. Chemical, had alleged that the Federal law preempted the field. We note that C.P. Chemical has not briefed the issue of Fed-

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[26] Cf. *Purity Supreme, Inc.* v. *Attorney Gen.*, 380 Mass. 762, 776 (1980) (opponent may not sustain burden of proof by arguing that record does not affirmatively show facts supporting regulation); *Colella* v. *State Racing Comm'n*, 360 Mass. 152, 156 (1971) (same).

[27] See *American Family Life Assurance Co.* v. *Commissioner of Ins.*, *ante* 468, 478 n.6 (1983) (court may consider evidence before commissioner, as well as any other relevant information, in reviewing regulations).

eral preemption in this court. Therefore, we need not address the issue. Mass. R. A. P. 16(a)(4), as amended, 367 Mass. 921 (1975).

9. *Other arguments.* C.P. Chemical argues that the retroactive application of the repurchase regulations violates the due process clause and the contract clause of the United States Constitution. Examining the two constitutional issues together, *American Mfrs. Mut. Ins. Co.* v. *Commissioner of Ins.*, 374 Mass. 181, 190 (1978), we reject the argument. An examination of the factors delineated in the *American Mfrs.* case compels the conclusion that the retroactive operation of the repurchase regulations is reasonable. See *id.* at 191. Cf. *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 29 (1977) (retroactive legislation disrupting contracts must be reasonable and necessary to serve important State interests). The public interest in eliminating the health hazard posed by the presence of UFFI in houses overrides the interests of the suppliers of UFFI in the integrity of a contract. We cannot say that the commissioner was unreasonable in concluding that repurchase was the most effective remedy available.

Likewise, we are not persuaded by C.P. Chemical's argument that the ban and repurchase regulations are unconstitutionally vague because they do not contain a definition of UFFI. See generally *Druzik* v. *Board of Health of Haverhill*, 324 Mass. 129, 134 (1949) (penal regulation must be clearly expressed so as to give guidance to those purportedly subjected to it). The commissioner declared "urea-formaldehyde foamed-in-place insulation" to be a banned hazardous substance and ordered it to be removed from commerce. 105 Code Mass. Regs. 650.020 (1979). The commissioner was not constitutionally required to incorporate the chemical definition of urea-formaldehyde foamed-in-place insulation into his regulations—the absence of such a definition does not render the regulations vague.

10. *Conclusion.* We conclude that the judge erred in holding that the commissioner's ban and repurchase regulations were illegal, arbitrary, and capricious. Accordingly, we reverse the judgments of the Superior Court and remand the case with directions to grant declaratory relief consistent with this decision.

So ordered.

APPENDIX B

IN THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

No. 2849

COMMISSIONER OF PUBLIC HEALTH,
Appellant

v.

BORDEN, INC., *et al.*,
Appellees

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that C.P. Chemical Company, Inc., appellee in the above-named action, hereby appeals to the Supreme Court of the United States from that part of the final judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts, entered in this action on April 12, 1983, rehearing denied on June 1, 1983, which reverses the judgment of the Superior Court in and for Suffolk County.

Respectully submitted,

/s/ Michael S. Marcus
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CERTIFICATE OF SERVICE

I, Glenn M. Englemann, hereby certify that I have this day served the foregoing Notice of Appeal, having caused two copies to be delivered to each of the following by first class mail, postage prepaid:

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DATED: July 28, 1983

APPENDIX C

SEIFMAN, SEMO & SLEVIN, P.C.
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July 28, 1983

Mr. Patrick J. Hurley
Clerk of the Court
Supreme Judicial Court for the
Commonwealth of Massachusetts
14th Floor
New Courthouse
Pemberton Square
Boston, Massachusetts 02108

Re: Borden, Inc. v. Commissioner of Public Health
No. 2849

Dear Mr. Hurley:

Enclosed please find a Notice of Appeal of the above-named action to the Supreme Court of the United States. Judgment in this action was entered on April 12, 1983, and rehearing was denied on June 1, 1983. Kindly stamp and return to us in the enclosed, stamped self-addressed envelope a copy of the notice for our files.

Thank you for your help in this matter.

Sincerely,

/s/ Glenn M. Engelmann
GLENN M. ENGELMANN

GME:slr

Enclosures

c.c: All counsel of record

IN THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

No. 2849

COMMISSIONER OF PUBLIC HEALTH,
Appellant

v.

BORDEN, INC., *et al.*,
Appellees

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

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Respectfully submitted,

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I, Glenn M. Englemann, hereby certify that I have this day served the foregoing Notice of Appeal, having caused two copies to be delivered to each of the following by first class mail, postage prepaid:

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